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SUPREME COURT, U.S.

No. 84-18

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

FLORENCE TALAMINI, ADMINISTRATRIX,
Appellant

v.

ALLSTATE INSURANCE COMPANY,
Appellee

On Appeal From the United States Court of Appeals
for the Third Circuit

MOTION TO DISMISS OR AFFIRM

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No. 84-18

FLORENCE TALAMINI, Administratrix,
Appellant

v.

ALLSTATE INSURANCE COMPANY,
Appellee

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellee, Allstate Insurance Company, moves to dismiss the appeal herein for want of jurisdiction under 28 U.S.C. §1254 or to affirm the judgment of the Court of Appeals on the ground that it was without jurisdiction, and to award appellee double costs and attorneys' fees.

QUESTIONS PRESENTED

1. Does this Court have jurisdiction under 28 U.S.C. §1254(2) over an appeal from a judgment that did not hold any state law invalid as repugnant to federal law?

2. Should this Court take certiorari jurisdiction under 28 U.S.C. §2103 of an appeal

(A) over which the Court of Appeals did not have jurisdiction; and (B) where the judgment of the Court of Appeals does not conflict with any decision of another federal appellate court, nor with any decision of the applicable State court of last resort, nor with any applicable decisions of this Court?

3. Was the Court of Appeals correct in dismissing for want of jurisdiction an appeal from an order disposing of only one of multiple claims where the district court did not direct entry of final judgment and did not determine that there was no just reason for delay?

STATEMENT OF THE CASE

This appeal arises out of an action for benefits provided under an insurance policy issued in accordance with the Pennsylvania No-fault Motor Vehicle Insurance Act ("No-fault Act"), 40 P.S. §1009.101, *et seq.*[1] Appellant, Florence Talamini ("Talamini") filed a two-count Complaint in the Court of Common Pleas of Philadelphia County, Pennsylvania. Appellee, Allstate Insurance Company ("Allstate") removed the suit to the federal district court for the Eastern District of Pennsylvania on the basis of the court's diversity jurisdiction. 28 U.S.C. §§1332, 1441. Because Allstate has not paid the no-fault benefits which appellant claims in Count I of the Complaint, Count II alleged that Allstate's conduct violated the provisions of the Pennsylvania Unfair Insurance Practices Act ("UIPA"), 40 P.S. §1171.1, *et seq.*, and claimed up to three times the amount of those benefits and statutory penalties as damages under §201-9.2 of the Pennsylvania Unfair Trade Practices and Consumer Protection Act ("UTPCPA"). 73 P.S. §201-9.2

Allstate filed a motion to dismiss Count II of the Complaint pursuant to Fed.R.Civ.Proc. 12(b)(6) on the ground that no private right of action for the practices or conduct alleged exists under the UIPA or the UTPCPA, and thus Count II failed to state a claim upon which relief can be granted. The district court issued a memorandum and Order (A. 3-9) dismissing Count II and denying Talamini's motion to defer decision and place the action in suspense. The district court stated that, if any intervening decision by the Court of Appeals required reconsideration of the dismissal order, Talamini's counsel could so move. (A. 8-9).

Talamini appealed to the Court of Appeals for the Third Circuit. Allstate filed a motion to dismiss the appeal on grounds that the district court made no direction for entry of final judgment as to Count II upon an express determination that there was no just reason for delay.

1. Repealed, Act of February 12, 1984, P.L. _____, No. 11, §8.

Fed.R.Civ.Proc. 54(b). The Court of Appeals dismissed the appeal for want of jurisdiction. (A. 1)

ARGUMENT

The Court Should Dismiss this Appeal for Want of Jurisdiction Under 28 U.S.C. §1254 and Affirm the Judgment of the Court of Appeals

Appellant styles the instant proceeding as an "Appeal from the United States Court of Appeals for the Third Circuit" taken "pursuant to 28 U.S.C.A. §1254." Allstate submits that this Court does not have appellate jurisdiction herein and must, therefore, dismiss the appeal as described.

Appellate review by this Court of cases in the federal courts of appeals may be had only under 28 U.S.C. §1254(2) (1982). That section of the statute provides for Supreme Court review by appeal:

> by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . . and the review on appeal shall be restricted to the Federal questions presented[.]

28 U.S.C. §1254(2).

The jurisdictional statement filed in this Court fails to raise any such appeal. In dismissing the appeal below, the Court of Appeals did not hold any State statute to be either invalid or repugnant to any federal law.

Therefore, this appeal is improper and should be dismissed for want of jurisdiction. *Bradford Elec. Co. v. Clapper*, 284 U.S. 221, 222-223 (1931).

Nor should the Court, on dismissing this improper appeal, take certiorari jurisdiction under 28 U.S.C. §2103. First, the Court of Appeals determined that it did not have jurisdiction. A writ of certiorari cannot properly be issued to require that court to send up a cause over which it has no jurisdiction. *Good Shot v. United States*, 179 U.S. 87, 88-89 (1900).

Second, this improper appeal does not present the special circumstances that characterize this Court's exercise of its certiorari jurisdiction.

The Court has taken certiorari jurisdiction when a court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter. *E.g., Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7 (1980); *Goldlawr, Inc. v. Heiman*, 369 U.S. 463 (1962); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). Sup.Ct.R. 17.1(a). The Court may take certiorari jurisdiction when a court of appeals decides a federal question in a manner conflicting with a state court of last resort. Sup.Ct.R. 17.1(a). The Court also may review by writ of certiorari a court of appeals decision on a federal question which the Court has not settled or which decision conflicts in any way with the Court's applicable decisions. Sup.Ct.R. 17.1(c).

There is no conflict among the various circuits as to the requirement for appeals under Fed.R.Civ.Proc. 54(b) ("Rule 54(b)"). To the contrary, the Courts of Appeals are in accord that they do not have jurisdiction over appeals of judgments, however designated, as to fewer than all claims in a suit without express determination by the district court that there is no just reason for delay. *Curtiss-Wright*, 446 U.S. at 5, 8. *E.g., Burney v. City of Pawtucket*, 728 F.2d 547 (1st Cir. 1984); *United States Fire Ins. Co. v. Smith Barney, Harris Upham & Co., Inc.*, 724 F.2d 650 (8th Cir. 1983); *Wolf v. Banco Nacional de Mexico*, 721 F.2d 660 (9th Cir. 1983); *Ivanov-McPhee v Washington Nat'l Ins. Co.*, 719 F.2d 927 (7th Cir. 1983); *Liskey v. Oppenheimer & Co., Inc.*, 717 F.2d 314 (6th Cir. 1983); *Para-Chem Southern, Inc. v. M. Lowenstein Corp.*, 715 F.2d 128 (4th Cir. 1983); *Aleut Tribe v. United States*, 702 F.2d 1015 (Fed. Cir. 1983); *Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365 (11th Cir.), *cert. denied*, _____ U.S. _____, 104 S.Ct. 239 (1983); *Wheeler Mach. Co. v. Mountain States Min. Enter., Inc.*, 696 F.2d 787 (10th Cir. 1983); *Sandoz v. Crain Bros., Inc.*, 694 F.2d 88 (5th Cir. 1982); *Shirey v.*

Bensalem Twp., 663 F.2d 472 (3rd Cir. 1981); *Brunswick Corp. v. Sheridan*, 582 F.2d 175 (2d Cir. 1978); *Knable v. Wilson*, 187 U.S. App. D.C. 48, 570 F.2d 957 (1977).

Hence, the dismissal of Talamini's improper appeal by the Court of Appeals for the Third Circuit was consistent with universal federal practice.

Furthermore, the Court of Appeals' dismissal of Talamini's improper piecemeal appeal does not conflict with any Pennsylvania Supreme Court decision on the question of finality of judgments for purposes of *federal* procedure. *See, e.g., Commonwealth v. Bolden*, 472 Pa. 602, 612-613 & n.8, 373 A.2d 90, 95 & n.8 (1977). In fact, as may be expected, the Pennsylvania Supreme Court has not rendered any decision concerning federal appellate court jurisdiction of final judgments as to fewer than all claims at trial under Fed.R.Civ.Proc. 54(b). Significantly, Pennsylvania's courts do not have a procedural provision analogous to Rule 54(b).

Since this Court's 1980 decision in *Curtiss-Wright, supra*, it has been settled that certain steps must be followed at the trial court level before any final judgment on one of multiple claims may be appealed. It is left to the sound judicial discretion of the district court whether to take those steps and to determine the appropriate time when each final decision in a multiple claims action is ready for appeal. 446 U.S. at 8; *Dudo v. Schaeffer*, 93 F.R.D. 524, 530 (E.D.Pa. 1982). Where the district court makes no Rule 54(b) determination in such cases, a circuit court does not have jurisdiction over appeals from orders adjudicating fewer than all claims. *Shirey*, 663 F.2d at 475. *E.g., Aleut Tribe*, 702 F.2d at 1020-1021; *Clark v. United States*, 624 F.2d 3, 4 (2d Cir. 1980). When Talamini filed her notice of appeal from the nonappealable order dismissing Count II, she did not divest the district court of jurisdiction over this matter. *Griggs v. Provident Consumer Discount Co.*, 51 U.S.L.W. 3413 (U.S. Nov. 29, 1982), *citing Ruby v. Sec'y of United States Navy*, 365 F.2d 385, 389 (9th Cir. 1966), *cert. denied*, 386 U.S. 1011 (1967).

Because the district court's judgment did not consider Count I of Talamini's Complaint, the judgment is partial dismissal only. There was no direction for entry of final judgment on Count II and no determination that there was no just reason for delay. The entirety of Talamini's lawsuit remains in the district court. A federal district court and a federal appellate court should not attempt to assert simultaneous jurisdiction over a case. *Griggs*, 51 U.S.L.W. at 3413. The Court of Appeals correctly dismissed the appeal for want of jurisdiction.

This purported appeal does not satisfy the jurisdictional requirements of 28 U.S.C. §1254(2) and, therefore, should be dismissed. Furthermore, since it fails to present the special circumstances that warrant a writ of certiorari, the Court should deny certiorari under 28 U.S.C. §2103. Moreover, since there is no reasonable ground for this "appeal" to be granted on a writ of certiorari, pursuant to 28 U.S.C. §2103,[2] Allstate requests that the Court award it double costs and attorneys' fees for actual time spent in connection with this purported appeal.

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2. Section 107(2) of the No-fault Act, 40 P.S. §1009.107(2), also provides:

> If in any action by a claimant to recover no-fault benefits from an obligor, the court determines that the claim or any significant part thereof is fraudulent or so excessive as to have no reasonable foundation, the court may award the obligor's attorney a reasonable fee based upon actual time expended. The court, in such case, may direct that the fee shall be paid by the claimant or that the fee may be treated in whole or in part as an offset against any benefits due or to become due to the claimant.

CONCLUSION

The Court of Appeals did not invalidate any Pennsylvania statute as repugnant to the laws of the United States. That Court properly dismissed the appeal below because it did not have jurisdiction over a final judgment. Hence, this Court does not have jurisdiction of the purported appeal under 28 U.S.C. §1254(2).

Moreover, this matter fails to present any of the special circumstances under which this Court would grant a writ of certiorari. To the contrary, the judgment of the Court of Appeals is consistent with the applicable decisions of this Court and of every other federal court of appeals.

For these reasons, and for all the reasons set forth in the foregoing argument, appellee, Allstate Insurance Company requests that the Supreme Court dismiss this appeal or affirm the judgment of the Court of Appeals and award Allstate double costs and attorneys' fees incurred.

Respectfully submitted,

DUANE, MORRIS & HECKSCHER

By_____

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APPENDIX

This Appendix sets forth the listing of Allstate Insurance Company's parents, subsidiaries and affiliates as required by Rule 28.1.

Allstate's parent corporation is Sears, Roebuck and Co. Allstate's affiliates and subsidiaries (except for its wholly owned subsidiaries, the wholly owned subsidiaries of Sears, Roebuck and Co. and the wholly owned subsidairies of their subsidiaries and wholly owned subsidiaries) are:

Allstate Insurance Company of Canada

Allstate Life Insurance Company of Canada

The Armstrong Rubber Company

Copolymer Rubber and Chemical Corporation

DeSota, Inc.

Kellwood Company

Roper Corporation

Sears Roebuck de Mexico, S.A. de C.V.

Ir dis Limited

Simpson-Sears Acceptance Co., Ltd.

Simpson-Sears Properties Ltd.

Universal-Rundle Corp.

"Affiliates" listed above are those which Allstate included as of December 31, 1981 in Item 2 of the Registration Statement which Allstate is required to file in its domiciliary state to comply with the Insurance Holding Company Systems Act, Ill. Ann. Stat. Ch. 73 §7431.1 *et seq*. Affiliates whose assets are less than one-half of 1% of Allstate's assets is available upon request.